

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SHERRY R. LUKES,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

Case No.: 2:14-cv-00077-GMN-GWF

ORDER

Pending before the Court for consideration is the Motion to Remand (ECF No. 15) filed by Plaintiff Sherry R. Lukes (“Plaintiff”) and the Cross-Motion to Affirm (ECF No. 16) filed by Defendant Carolyn W. Colvin (“Defendant”). These motions were referred to the Honorable George W. Foley, Jr., United States Magistrate Judge, for a report of findings and recommendations pursuant to 28 U.S.C. §§ 636 (b)(1)(B) and (C). Judge Foley entered a Report and Recommendation (ECF No. 20), recommending Plaintiff’s Motion to Remand be denied and Defendant’s Cross-Motion to Affirm be granted. Plaintiff has filed an Objection to the Report and Recommendation (ECF No. 21), and Defendant has filed a Response (ECF No. 22).

I. BACKGROUND

Pursuant to Title II of the Social Security Act, Plaintiff applied for disability insurance benefits on April 22, 2010, alleging a period of disability beginning on January 5, 2010 due to fibromyalgia, hypertension, asthma/bronchial condition, Graves disease, degenerative disc disease of the spine, and Obesity. (Administrative Record (“A.R.”) 32, 139). Plaintiff’s application was denied, and following a hearing on February 13, 2012, an Administrative Law Judge (“ALJ”) issued a decision denying Plaintiff’s claim for benefits. (*Id.* 30–40, 47–60).

1 In the decision, the ALJ applied the five-step sequential evaluation process established by
2 the Social Security Administration to determine whether Plaintiff was disabled.¹ (*Id.* 30–40). In
3 assessing Plaintiff’s residual functional capacity (“RFC”) at the beginning of step four of the
4 analysis, the ALJ determined that Plaintiff could perform light work with certain additional
5 limitations, including that she could only occasionally climb ramps, stairs, or ladders; could
6 frequently balance, stoop, kneel, crouch, and crawl; could never climb ropes or scaffolds; and
7 should avoid exposure to extreme temperatures or to concentrated chemicals, dust, or fumes. (*Id.*
8 34). The ALJ further found that much of Plaintiff’s testimony about her disability was not
9 credible and was inconsistent with her RFC. (*Id.* 35). The ALJ subsequently concluded that
10 Plaintiff could still perform her previous jobs as an apartment manager, courier, and secretary.
11 (*Id.* 38). Furthermore, at step five of the analysis, the ALJ determined that there were a
12 significant number of alternate occupations that Plaintiff could hold existing in the national
13 economy, including silverware wrapper or data entry clerk. (*Id.* 39–40). Accordingly, the ALJ
14 concluded that Plaintiff was not disabled. (*Id.* 40).

15 Following the ALJ’s decision, Plaintiff filed a Request for Review, which was denied by
16 the Appeals Council, rendering the ALJ’s decision final and reviewable by this Court. (A.R. 5–
17 8). Subsequently, on January 29, 2014, Plaintiff filed her Complaint (ECF No. 3) before this
18 Court seeking a reversal of the ALJ’s decision.

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20 ¹ The five-step sequential evaluation procedure, during which a finding at any step that a claimant is disabled or
21 not disabled concludes the assessment, is as follows: Under the first step, the Secretary determines whether a
22 claimant is currently engaged in substantial gainful activity. 20 C.F.R. § 416.920(b). If so, the claimant is not
23 considered disabled. *Id.* § 404.1520(b). Second, the Secretary determines whether the claimant’s impairment is
24 severe. *Id.* § 416.920(c). If the impairment is not severe, the claimant is not considered disabled. *Id.* § 404.152(c).
25 Third, the claimant’s impairment is compared to the “List of Impairments” found at 20 C.F.R. § 404, Subpt. P,
App. 1. The claimant will be found disabled if the claimant’s impairment meets or equals a listed impairment. *Id.*
§ 404.1520(d). If a listed impairment is not met or equaled, the fourth inquiry is whether the claimant can perform
past relevant work. *Id.* § 416.920(e). If the claimant can engage in past relevant work, then the claimant is not
disabled. *Id.* § 404.1520(e). If the claimant cannot perform past relevant work, but the Secretary demonstrates that
the claimant is able to perform other kinds of work, the claimant is not disabled. *Id.* § 404.1520(f). Otherwise, the
claimant is entitled to disability benefits. *Id.* § 404.1520(a).

1 **II. LEGAL STANDARD**

2 A party may file specific written objections to the findings and recommendations of a
 3 United States Magistrate Judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B);
 4 D. Nev. R. IB 3-2. Upon the filing of such objections, the Court must make a de novo
 5 determination of those portions of the Report and Recommendation to which objections are
 6 made. *Id.* The Court may accept, reject, or modify, in whole or in part, the findings or
 7 recommendations made by the Magistrate Judge. 28 U.S.C. § 636(b)(1); D. Nev. IB 3-2(b).

8 A federal court's review of an ALJ's decision on social security disability is limited to
 9 determining only (1) whether the ALJ's findings were supported by substantial evidence and (2)
 10 whether the ALJ applied the proper legal standards. *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th
 11 Cir. 1996); *Delorme v. Sullivan*, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence is
 12 "more than a mere scintilla but less than a preponderance; it is such relevant evidence as a
 13 reasonable mind might accept as adequate to support a conclusion." *Vasquez v. Astrue*, 572 F.3d
 14 586, 591 (9th Cir. 2009) (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).

15 **III. DISCUSSION**

16 The sole argument Plaintiff raises in her Motion to Remand is that the ALJ erred in
 17 finding that Plaintiff could still perform her past relevant work because that finding was
 18 contradictory to the testimony of the examining physician, Dr. Casper, and was not supported by
 19 substantial evidence. (Mot. to Remand 4:17–11:18, ECF No. 15).

20 In the Report and Recommendation, Judge Foley found that the ALJ's finding that
 21 Plaintiff could perform past relevant work was supported by substantial evidence—specifically
 22 the opinion of the non-examining physician, Dr. Coolidge, and portions of Dr. Casper's own
 23 findings—and that the ALJ's reasons for discrediting some of Dr. Casper's testimony were
 24 therefore legitimate. (Report and Recommendation 20:18–25:2, ECF No. 20). Accordingly,
 25 Judge Foley found that the ALJ did not err in giving Dr. Coolidge's opinion greater weight than

1 Dr. Casper's and in finding that Plaintiff has the RFC to perform light work. (*Id.* 25:4–8).

2 In her Objection, Plaintiff argues that the ALJ did err in favoring Dr. Coolidge's opinion
3 over Dr. Casper's because in Social Security disability benefits cases, the opinions of an
4 examining physician are generally given more weight than to those of a reviewing physician.
5 (Objection 3:13-7:6, ECF No. 18) (citing 20 C.F.R. §§ 404.1527(c)(2) and 416.927(c)(1)).
6 Favoring a non-examining physician's testimony over the testimony of an examining physician,
7 however, is not a legal error when it is also supported by other independent evidence.
8 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) ("Although the contrary opinion of a
9 non-examining medical expert does not alone constitute a specific, legitimate reason for rejecting
10 a treating or examining physician's opinion, it may constitute substantial evidence when it is
11 consistent with other independent evidence in the record."). In this case, the ALJ discredited
12 portions of Dr. Casper's opinion because they were contradicted by Dr. Coolidge and because
13 they were contradicted by the medical record as a whole and by other portions of Dr. Casper's
14 own findings. (A.R. 36–37).

15 In essence, Plaintiff is asking the Court in her Motion to Remand and Objection to
16 reweigh the evidence in order to reverse the ALJ's finding. However, the role of this Court on
17 review is not to reweigh the evidence and arrive at an independent conclusion, but to determine
18 whether the ALJ's findings were supported by substantial evidence and based on the proper legal
19 standard. *Smolen*, 80 F.3d at 1279; *see also Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)
20 ("Where evidence is susceptible to more than one rational interpretation, it is the ALJ's
21 conclusion that must be upheld."). Having reviewed the record, the Court agrees with the
22 recommendation of Judge Foley and finds that the ALJ's determination that Plaintiff can perform
23 her past relevant work was supported by substantial evidence and based on the proper legal
24 standard. Accordingly, Plaintiff's Objection is without merit.

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1 **IV. CONCLUSION**

2 **IT IS THEREFORE ORDERED** that the Report and Recommendation (ECF No. 20) is
3 **ACCEPTED and ADOPTED in full** to the extent it is consistent with this opinion.

4 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Remand (ECF No. 15) is
5 **DENIED** and Defendant's Cross-Motion to Affirm (ECF No. 16) is **GRANTED**.

6 The Clerk of the Court shall enter judgment accordingly and close the case.

7 **DATED** this 30th day of July, 2015.

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12 Gloria M. Navarro, Chief Judge
13 United States District Court
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